

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Elroy Gutierrez,

10 Petitioner,

11 v.

12 David Shinn, et al.,

13 Respondents.
14

No. CV-18-08209-PCT-MTL

ORDER

15 Magistrate Judge James Metcalf's Report and Recommendation ("R&R") (Doc. 16)
16 recommends that this Court deny Petitioner Elroy Gutierrez's Petition for Writ of Habeas
17 Corpus (the "Petition"). (Doc. 1.) Petitioner filed an Objection and the Respondents
18 submitted a Response. (Docs. 17 & 18.) The Objection is overruled. The Court adopts
19 the R&R and dismisses the Petition.

20 **I. BACKGROUND**

21 Petitioner was driving a vehicle, accompanied by a passenger. (Doc. 13-1 at 124.)
22 An Arizona Department of Public Safety state trooper was parked on a highway median
23 when Petitioner's vehicle passed. (*Id.*) Petitioner slowed the vehicle below the speed limit.
24 (*Id.*) After Petitioner applied the brakes twice without an apparent reason and his tires
25 passed the white-fog line marking the lanes, the trooper initiated a traffic stop. (*Id.*) During
26 the stop, the trooper discovered that Petitioner was driving on a suspended license. (Doc.
27 13-2 at 17.) The trooper further questioned Petitioner and the passenger, who each gave
28 inconsistent statements about the nature of their trip. (Doc. 13-1 at 124.) The trooper

1 requested a drug canine unit to assist. (*Id.*) The drug dog subsequently alerted on the
2 vehicle. (*Id.*) A search of the vehicle revealed two handguns, heroin, meth and a syringe.
3 (*Id.*) Petitioner admitted that he used heroin earlier that day. (*Id.*) He also voluntarily
4 gave a urine sample, which evidenced heroin, methamphetamine and marijuana use. (*Id.*)

5 After a joint trial with his passenger, a jury convicted Petitioner of aggravated DUI,
6 transporting a dangerous drug for sale, possessing a narcotic drug, possessing drug
7 paraphernalia and two counts of misconduct involving weapons. (*Id.*) The superior court
8 sentenced Petitioner to concurrent prison terms, the longest of which was 14 years. (*Id.*)

9 The Arizona Court of Appeals affirmed his convictions. (Doc. 13-1 at 136.) The
10 Arizona Supreme Court denied review. (Doc. 13-2 at 2.) He then filed a post-conviction
11 relief (“PCR”) notice, and PCR counsel was appointed to assist him. (*Id.* at 4-6.) After
12 reviewing the record, Petitioner’s PCR counsel withdrew from the case, indicating that he
13 could find no colorable claims to raise in a PCR Petition. (*Id.* at 11-13.) Petitioner then
14 filed a *pro per* PCR petition. (*Id.* at 16-25.) The PCR petition alleged ineffective assistance
15 of trial and appellate counsel, conflict of interest with trial counsel and ineffective
16 assistance of PCR counsel. (*Id.*) More specifically, Petitioner argued that his attorneys
17 failed to challenge the completeness of the state’s disclosures about evidence (*id.* at 19),
18 failed to challenge whether all evidence was legally obtained (*id.*), failed to make certain
19 admissibility challenges (*id.*), failed to hire an investigator to inquire into police
20 misconduct (*id.* at 20), failed to move for dismissal (*id.*), and failed to object to an
21 unspecified change during jury deliberations (*Id.* at 23). He also faulted PCR counsel for
22 withdrawing. (*Id.* at 18.) The PCR court denied relief. (*Id.* at 45.) The Arizona Court of
23 Appeals, in a memorandum decision, denied relief. (*Id.* at 55-56.) Petitioner filed a *pro se*
24 Petition for Writ of Habeas Corpus in this Court. (Doc. 1.)

25 **II. LEGAL STANDARD ON WRIT OF HABEAS CORPUS**

26 “When a federal district court reviews a state prisoner’s habeas corpus petition
27 pursuant to 28 U.S.C. § 2254, it must decide whether the petitioner is ‘in custody in
28 violation of the Constitution or laws or treaties of the United States.’”

1 *Coleman v. Thompson*, 501 U.S. 722, 730 (1991) (*quoting* 28 U.S.C. § 2254). The Court
2 shall not grant the petition unless the state court adjudication:

3 (1) resulted in a decision that was contrary to, or involved an
4 unreasonable application of, clearly established Federal law, as
5 determined by the Supreme Court of the United States; or

6 (2) resulted in a decision that was based on an unreasonable
7 determination of the facts in light of the evidence presented in
8 the State court proceeding.

28 U.S.C. § 2254(d).

9 A court reviewing a habeas petition should look to the last reasoned state court
10 decision to address the issues for which a petitioner seeks relief. *See Wilson v. Sellers*, __
11 U.S. __, 138 S. Ct. 1188, 1192 (2018). However, if the state court clearly overlooked a
12 federal claim presented to it, *de novo* review applies. *Johnson v. Williams*, 568 U.S. 289,
13 303 (2013).

14 This Court reviews *de novo* those portions of the Magistrate Judge’s report subject
15 to an objection. 28 U.S.C. § 636(b)(1)(C). The Court “may accept, reject, or modify, in
16 whole or in part, the findings or recommendations made by the magistrate judge.” *Id.*
17 District courts are not required to review “any issue that is not the subject of an objection.”
18 *Thomas v. Arn*, 474 U.S. 140, 149 (1985).

19 **III. DISCUSSION OF MR. GUTIERREZ’S HABEAS PETITION**

20 The Petition raises seven grounds for relief. Petitioner alleges (1) the trial court
21 abused its discretion by failing to suppress evidence obtained from an allegedly unlawful
22 traffic stop; (2) the trial court abused its discretion by denying a motion to sever Mr.
23 Gutierrez’s trial from his co-defendant’s; (3) the State placed Mr. Gutierrez in double
24 jeopardy by charging him with two weapons charges when both weapons were possessed
25 at the same time; (4) the trial court imposed a vindictive sentence; (5) the trial court abused
26 its discretion by misapplying state sentencing law; (6) ineffective assistance of trial
27 counsel; and (7) ineffective assistance of appellate and post-conviction relief counsel.

28 ///

1 **A. Ground One: Abuse of Discretion Due to Failure to Suppress Evidence**
2 **from an Unlawful Traffic Stop**

3 Petitioner claims that “[t]he initial stop was unreasonable and illegal under the 4th
4 and 14th Amendments of the Constitution and Federal law” because it “exceed[ed] the time
5 needed to handle the matter for [which] the stop was made.” (Doc. 17 at 4.) The Objection
6 purports to challenge both the initial stop and the subsequent investigative detention. The
7 Petition itself only challenged the initial stop. The district court may, in its discretion,
8 consider arguments raised for the first time in an objection. *See Brown v. Roe*, 279 F.3d
9 742, 745-46 (9th Cir. 2002); *United States v. Howell*, 231 F.3d 615 (9th Cir. 2000). The
10 Ninth Circuit has said that in exercising that discretion, *pro se* petitioners should be
11 afforded the benefit of the doubt. *Brown*, 279 F.3d at 746. The Court, in its discretion,
12 addresses both arguments since the Court can dispose of the extended detention claim using
13 an analysis like that used for the initial stop and because of the general preference for
14 granting leeway to *pro se* petitioners.

15 The R&R correctly identified Petitioner’s argument in Ground One as a request to
16 enforce the exclusionary rule. (Doc. 16 at 6.) With respect to the initial stop, the R&R
17 also correctly determined that habeas review is not available here because Petitioner has
18 not shown that “the State has [not] provided an opportunity for full and fair litigation of a
19 Fourth Amendment claim. . . .” *Stone v. Powell*, 428 U.S. 465, 482 (1976); *see also*
20 *Newman v. Wengler*, 790 F.3d 876, 878 (9th Cir. 2015). (Doc. 16 at 7.) The Court finds
21 that the same reasoning applies to Petitioner’s argument about the length of the subsequent
22 investigative detention. At a suppression hearing before the trial court, Petitioner
23 challenged his continued detention beyond the initial traffic stop. (Doc. 13-2 at 71.) He
24 did not, but could have, raised the issue on direct appeal. (Doc. 13-1 at 31-39.) Because
25 Petitioner has been afforded a full and fair opportunity to litigate the lawfulness of the
26 investigative detention, that Fourth Amendment claim is not reviewable in a federal habeas
27 action. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9th Cir. 1996). (“The relevant inquiry
28 is whether petitioner had the opportunity to litigate his claim, not whether he did in fact do

1 so or even whether the claim was correctly decided.”).

2 The Court overrules this objection and denies Petitioner’s request for relief on
3 Ground One.

4 **B. Ground Two: Abuse of Discretion Due to Denial of Motion to Sever Trial**

5 Petitioner argues that “the trial court failed to adhere to federal law by failing to
6 sever petitioner’s case from his co-defendant, despite their antagonistic defenses, and was
7 thereby prejudiced with no chance for an acquittal.” (Doc. 1 at 7.) The R&R correctly
8 explains, however, that separate trials are not required under federal statutory or
9 constitutional law, even when defendants raise mutually antagonistic defenses. (Doc. 16
10 at 13.) The R&R further reasons that any prejudice was mitigated by the trial court’s
11 instruction that the jury may only convict him “based upon that defendant’s own conduct
12 and from the evidence which applies to that defendant, as if that defendant were being tried
13 alone.” (Exh. G, Opinion at ¶ 17; Doc. 13-1 at 128-29); *see also Weeks v. Angelone*, 528
14 U.S. 225, 234 (2000) (“A jury is presumed to follow its instructions.”).

15 Petitioner’s Objection largely reiterates the assertions in his Petition rather than
16 raising specific concerns about the R&R. He argues that “a district court should grant a
17 severance under Rule 14 if there is a serious risk that a joint trial would compromise a
18 specific trial right of one of the defendants and/or prevent[] the jury from making a reliable
19 judgment about guilt or innocence. Denial of a motion to sever trial violates due process.
20 Trial should be render[e]d ‘fundamentally unfair.’” (Doc. 17 at 4.)

21 Because the R&R correctly found that separate trials were not required under federal
22 law, this Court overrules Petitioner’s objection, adopts the R&R and denies Petitioner’s
23 request for relief on Ground Two.¹

24 **C. Ground Three: Double Jeopardy**

25 Petitioner argues that double jeopardy attached when prosecutors charged him with
26

27 ¹ Petitioner argued on direct appeal that the trial court abused its discretion in denying his
28 motion to sever. (Doc. 13-1 at 39-43.) But the Arizona Court of Appeals decided the issue
solely on state law grounds. (*Id* at 127-129.) Because Petitioner fairly presented this
federal claim in state court, the R&R properly engaged in *de novo* review of the merits.
Johnson v. Williams, 568 U.S. 289, 303 (2013).

1 two counts of misconduct with weapons. (Doc. 1 at 8.) The Petition further argues that
2 possession of two weapons while he was transporting drugs should constitute a single
3 offense. (*Id.*)

4 The R&R found that double jeopardy did not attach. (Doc. 16 at 16.) It noted that
5 the “Arizona Court of Appeals held that the statute under which Petitioner was convicted
6 made [possession of] each [handgun] a separate offense.” (*Id.*) The Court agrees. The
7 dispositive question is whether the legislature meant to count each weapon as a separate
8 unit of prosecution.² See *Bell v. United States*, 349 U.S. 81, 83 (1955). The Arizona Court
9 of Appeals has determined that as a matter of state law, A.R.S. § 13-3102(A)(8) allows
10 each deadly weapon possessed during the commission of a felony drug offense to be
11 prosecuted separately. (Doc. 13 at 9; Doc. 18 at 2-4; See also Exh. G ¶ 24-25.)

12 Petitioner’s Objection merely restates the arguments in his Petition that double
13 jeopardy applies and that his conviction “imposed an unauthorized multiple punishment”
14 (Doc. 17 at 5.) This is not sufficient to put the Court on notice as to where Petitioner
15 believes the R&R erred, and the Court need not further address this ground. See *Eagleman*
16 *v. Shinn*, No. CV182708PHXRMDTF, 2019 WL 7019414, at *4 (D. Ariz. Dec. 20, 2019).

17 Accordingly, the Court overrules Petitioner’s objection and denies Petitioner’s
18 request for relief on Ground Three for the reasons explained in this section.

19 **D. Ground Four: Vindictive Sentencing for Petitioner’s Going to Trial In**
20 **Lieu of Accepting a Plea Deal**

21 Petitioner argues that the trial court unreasonably applied *Alabama v. Smith*. That
22 case holds that there is no presumption of judicial vindictiveness merely because a judge
23 imposes a greater sentence after trial than he did after a now-vacated plea. *Alabama v.*
24 *Smith*, 490 U.S. 794, 801 (1989). (Doc. 17 at 5.) He does not elaborate on this argument.
25 The Court agrees with the R&R’s reasoning that “Petitioner fails to show that under the

26 ² The R&R also applied *Blockburger v. United States*, which holds that a single act may
27 constitute more than one offense if each of the charged offenses has at least one distinct
28 element. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). The State argues that
this test is inapposite because *Blockburger* focuses on a single act that constitutes more
than one crime. (Doc. 18 at 3-4.) The Court agrees with the State that this is a unit of
possession issue rather than a *Blockburger* issue.

1 circumstances, there is a reasonable likelihood that the high post-trial sentence resulted
2 from vindictiveness, such that the presumption of vindictiveness should apply.” (Doc. 16
3 at 21.) Accordingly, the Court overrules Petitioner’s objection, adopts the R&R as to
4 Ground Four and denies Petitioner relief on this ground.

5 **E. Ground Five: Abuse of Discretion Due to Misinterpreting State**
6 **Sentencing Law**

7 Petitioner argues that the trial court should have imposed a sentence that allowed
8 him to earn early release credits, rather than a flat-time sentence, which does not. (Doc. 1
9 at 10.) He further claims that the trial judge violated federal law by not applying the correct
10 sentencing provision of the statute that bans transporting a dangerous drug. (*Id.*)

11 The R&R recognized that a due process claim based on a sentencing error might be
12 possible if Petitioner shows that (1) a state law error occurred; and (2) the error was
13 egregious. (Doc. 16 at 28.) The R&R reasons that the Arizona Court of Appeals’ holding
14 that there was no error is dispositive for the purposes of habeas review. (*Id.* at 30.)
15 Petitioner argues, however, that the habeas court should find that in presenting his state
16 law claims, he also raised federal claims. (Doc. 17 at 5-6.) He then argues that by citing
17 *Souch v. Schaivo*, 289 F.3d 616 (9th Cir. 2002), the R&R admits that state law errors exist.
18 (Doc. 17 at 6.) This argument mischaracterizes what the Magistrate Judge wrote.

19 The R&R analyzed whether a state due process claim might be possible here. (Doc.
20 16 at 28-30.) It rightly concluded that because the Arizona Court of Appeals held that the
21 trial court did not err in applying Arizona law, no state law error occurred. (*Id.* at 30.) A
22 federal court sitting in habeas may not, through fiat, overrule a state court of last resort’s
23 binding decision about what state law means. *Jammal v. Van de Kamp*, 926 F.2d 918, 919
24 (9th Cir. 1991) (“[w]e are not a state supreme court of errors.”). This Court therefore
25 overrules the objection, adopts the R&R and denies relief with respect to Ground Five.

26 **F. Grounds Six and Seven: Ineffective Assistance of Counsel**

27 In Ground Six, Petitioner alleged that his trial counsel was ineffective for failing to
28 challenge the completeness of the state’s disclosures and failing to hire an investigator to

1 investigate alleged law enforcement misconduct. In Ground Seven, Petitioner alleged
2 ineffective assistance of appellate and PCR counsel for failure to have an investigator
3 examine potential law enforcement misconduct, failure to challenge the admissibility and
4 relevance of certain evidence, and failure to challenge an unspecified change to jury
5 instructions that allegedly occurred during or immediately before jury deliberations. (Doc.
6 1 at 12; Doc. 17 at 8.) Ground Seven also alleges that PCR counsel violated federal law
7 by filing a brief stating that he could not find any colorable claims to raise in post-
8 conviction proceedings (*Id.*)

9 Grounds Six and Seven of the Petition both deal with ineffective assistance of
10 counsel. Given their similarity, the R&R addresses Ground Six and Ground Seven
11 together. The Objection also deals with both grounds at the same time. It is well
12 established that counsel is ineffective when (1) counsel's performance falls below the
13 objective standard of reasonableness; and (2) "there is a reasonable probability that, but for
14 counsel's unprofessional errors, the result of the proceeding would have been different."
15 *Strickland v. Washington*, 466 U.S. 668, 694 (1984). As the R&R rightly noted, there is
16 no constitutional right to effective assistance of PCR counsel for non-pleading defendants
17 who were entitled to a direct appeal with the assistance of counsel. (Doc. 16 at 35.)
18 Therefore, the Court does not address allegations that PCR counsel was ineffective. (*Id.*);
19 *see also* 28 U.S.C. 2254(i).

20 The Objection argues that counsel should have hired an investigator to examine
21 potential issues relating to the evidence's chain of custody, a warrantless search, fabrication
22 of reasonable suspicion, and the length of the stop. (Doc. 17 at 6.) Petitioner asserts,
23 without explanation, that the failure to investigate would have affected the outcome of trial.
24 (*Id.*) In the Objection, Petitioner argues that trial, appellate and PCR counsel all should
25 have "examined the actions by [the trooper] and found out that the stop was illegal and [ask
26 the court to] suppress[] the evidence and vacate[] the conviction." (*Id.* at 7.) The Objection
27 also argues that counsel should have questioned whether the length of the traffic stop was
28 unconstitutional. (*Id.* at 7.) Petitioner also uses the Objection to repeat his argument that

1 counsel should have challenged a change to jury instructions. (*Id.* at 8.) This objection
2 does not explain the specifics of what that change was or how it might have affected the
3 ruling, therefore the R&R rightly decided this issue.

4 Though Petitioner’s Objection provides additional specificity concerning what he
5 claims his attorneys failed to do, the dispositive facts that the R&R expresses have not
6 changed. Petitioner still offers no proof that there was any misconduct involving evidence,
7 or how an investigator would have discovered it. (Doc. 16 at 36.) As to Petitioner’s
8 argument that his appellate counsel was ineffective for failing to challenge the length of
9 the stop, the Court finds that Petitioner did not properly present that claim in state court
10 PCR proceedings or in his Petition. The Court therefore declines to address that claim in
11 the first instance. *See Howell*, 231 F.3d 615 (9th Cir. 2000).

12 Accordingly, the Court overrules the Objection, adopts the R&R and denies
13 Petitioner relief on this ground.

14 **G. Certificate of Appealability**

15 Petitioner alternatively asks the Court (part of Doc. 17) to issue a certificate of
16 appealability. Petitioner must obtain a certificate of appealability before he may appeal
17 this Court’s judgment. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(1); Rule 11(a) of the
18 Rules Governing Section 2254 Cases. This Court must issue or deny a certificate of
19 appealability when it enters a final order adverse to the applicant. Rule 11(a) of the Rules
20 Governing Section 2254 Cases. A certificate of appealability may only issue when the
21 petitioner “has made a substantial showing of the denial of a constitutional right.” 28
22 U.S.C. § 2253(c)(2). With respect to claims rejected on the merits, a petitioner must
23 “demonstrate that reasonable jurists would find the district court’s assessment of the
24 constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

25 Upon review of the record, the Court finds that reasonable jurists would not find the
26 Court’s assessments of the constitutional claims debatable or wrong.

27 ///

28 ///

1 **IV. Conclusion**

2 **Accordingly,**

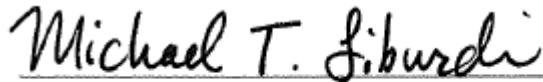
3 **IT IS ORDERED** that the Report and Recommendation (Doc. 16) is adopted as
4 modified on Page 6, note 2, herein.

5 **IT IS FURTHER ORDERED** that the Petition for Writ of Habeas Corpus (Doc.
6 1) is denied and dismissed with prejudice.

7 **IT IS FURTHER ORDERED denying** Petitioner's request for a Certificate of
8 Appealability. (Part of Doc. 17.) A Certificate of Appealability shall not issue, as the
9 resolution of the petition is not debatable among reasonable jurists.

10 **IT IS FINALLY ORDERED** that the Clerk of Court enter judgment.

11 Dated this 20th day of March, 2020.

12
13 

14 Michael T. Liburdi
15 Michael T. Liburdi
16 United States District Judge
17
18
19
20
21
22
23
24
25
26
27
28